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No. 95-1406

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

JUDY BAKER, BONNIE JOHNSON and MYRA ALLISON,

Petitioners,

vs.

PATRICIA HADLEY, COLUMBIA COUNTY AUDITOR, in her official and individual capacities,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Patricia Hadley, is insured by a publicly owned corporation, American International Group, Inc., which may have a financial interest in the outcome of this litigation.

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STATEMENT OF THE CASE

A. Introduction

The Sixth Circuit Court of Appeals' holding is limited to a remand to the District Court for a determination of whether there was clearly established law regarding the particular positions occupied by the Petitioners at the time of their dismissal.

This controversy arose because Patricia Hadley, the newly elected Columbiana County, Ohio, Auditor, desired to have loyal employees occupying the upper management positions of her office. There was not a wholesale firing in the office. The vast majority of her predecessor's office staff was left intact.

The Court of Appeals also ruled that a court must examine the inherent duties of the position in question and the duties that the new holder of that position will perform. [Court of Appeals at p. 8]. The court stated that the record in the District Court did not contain any evidence of what Patricia Hadley envisioned for the positions in question.

Therefore, this writ should not be granted as the Sixth Circuit Court has held the record is lacking of necessary facts. It would be more economic judicially for the case to be remanded to the District Court for the record to be supplemented and for a decision to be made. At that point an appeal may not be necessary, but would then be permissible. *Behrens v. Pelletier*, 516 U.S. __, 133 L. Ed. 2d 733 (1996). Moreover, as detailed herein, the Sixth Circuit did not err as to law in reversing the District Court.

B. The Underlying Facts

In November, 1990, longtime Democratic incumbent Columbiana County Auditor, Kent Bell, was defeated by

Republican opponent, Patricia Hadley, now Columbiana County Auditor, in the general election. Shortly after Bell's defeat, certain employees of the Auditor's office sought Union representation in order to protect their jobs. [R. 30: Deposition of J. Baker at pp. 26 and 27].

Two employees, Judy Baker and Bonnie Johnson (Petitioners in the present case), resigned their positions as "officer manager" and "Chief Deputy Auditor", respectively, on the same date, December 17, 1990. Their resignations were effected so that these employees could become eligible to join the then forming bargaining unit. [R. 29: Administrative transcript of Personnel Board of Review at p. 83 ("A.T. at 83")]. Neither of these employees suffered a commensurate reduction in pay nor were their job duties or responsibilities altered in the slightest way after their resignations. (*Id.*).

On March 11, 1991, Pat Hadley took office. On her first day, she had all employees of the Auditor's office complete "desk audits" which were detailed descriptions of their job duties, responsibilities and related information. [R. 28: Exhibits 3, 4 and 5 attached to Respondent's Motion for Summary Judgment].

Later that same day, March 11, 1991, Pat Hadley met with Petitioners and informed them that they had been dismissed. The only evidence before the trial court was Respondent Hadley dismissed Petitioners solely because she wanted to replace the upper management positions with people that would be loyal to her, that shared the same philosophies and beliefs on how the Auditor's office should be run, and to correct problems in the Auditor's office that she attributed Petitioners as part of being. [R.32: Deposition of Hadley at pp. 56-68]. Petitioners' termination had nothing to do with their political beliefs, and indeed, defendant Hadley did not even know Petitioners' political affiliation. [R. 32: Deposition of Hadley at pp. 12-14].

Petitioner, Myra Allison, was employed as "Budgetary Financial Specialist" [R. 32: Deposition of Hadley, Exhibit 1]; Myra Allison was described by others as the "head bookkeeper". She was responsible for approving and issuing requisitions for all county offices. She approved purchase orders with a self-imposed limit of $100,000. [R. 29: A.T. at pp. 24, 128 and 129].

REASONS FOR DENYING THE WRIT

I.

THE SIXTH CIRCUIT CORRECTLY INTERPRETED *HARLOW.* A FACTUAL DISPUTE OVER PETITIONERS' JOB DUTIES DOES NOT PRECLUDE SUMMARY JUDGMENT ON QUALIFIED IMMUNITY, PARTICULARITY WHERE, AS HERE, PLAINTIFFS MAY HAVE COLLUDED WITH THE DEFEATED OFFICEHOLDER IN CHANGING ASPECTS OF THEIR JOBS IMMEDIATELY PRIOR TO THE NEW OFFICEHOLDER TAKING OFFICE.

In *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982), this Court held that government officials performing discretionary functions generally are shielded from personal liability for civil damages so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. In arriving at this standard, the Court expressly rejected any requirement of subjective good faith on the part of the government official, since:

> The subjective element of the good faith defense frequently has proved incompatible with our admonition in [*Butz v. Economou,*

> 438 U.S. 478 (1978)] that insubstantial claims should not proceed to trial. Rule 56 of the Federal Rule of Civil Procedure provides that disputed questions of fact ordinarily may not be decided on motions for summary judgment. An official's subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury.

457 U.S. at 815-816.

In other words, since the very essence of the qualified immunity defense is to provide protection to the government official, this Court deleted the subjective good faith requirement because it would frequently be considered a question of fact for the jury, not resolvable on a summary judgment motion.

In the present case, the Petitioners argue that the availability of qualified immunity must, in a patronage dismissal situation, always depend on the actual job duties that the employee was performing for the defeated officeholder at the time the new officeholder took office. But, just like subjective good faith, the plaintiff's actual job duties will frequently be in dispute and, just like subjective good faith, not resolvable on a summary judgment motion. The discharged employee will attempt to show his or her actual job duties were routine, nonpolicymaking, nonconfidential, nonsupervisory, etc. while, on the other hand, the government official will attempt to show exactly the opposite.

Using the Petitioners' proposed "actual job duties" standard would completely annihilate the qualified immunity defense and, just as with the subjective good faith element jettisoned in

Harlow, frequently generate material issues of fact that cannot be resolved on a summary judgment motion. For the same reasons that this Court rejected a requirement of subjective good faith for qualified immunity, it likewise must reject any proposed standard of "actual job duties" for qualified immunity in patronage dismissal cases.

Not only would Petitioners' proposed standard lead to frequent denials of summary judgment on qualified immunity, but also it would extend an open invitation to patronage employees of a defeated officeholder to collude with the officeholder, after his or her defeat but prior to installment of the newly elected official, to downgrade their job titles and responsibilities. There is evidence that happened here. As noted by the Court of Appeals:

> At the time that Defendant, Hadley, was elected, Plaintiffs, Judy Baker and Bonnie Johnson, held the positions of office manager and chief deputy auditor, respectively. However, on December 17, 1990, prior to the date Hadley took office, both Baker and Johnson submitted resignations from their job titles but continued to work for Auditor Bell. Baker and Johnson's job responsibilities did not change after they resigned from their respective titles. Prior to taking office, Auditor-Elect, Hadley, received a letter from then Auditor Bell that provided Hadley with descriptions of Plaintiffs' jobs. Bell described Plaintiff Baker's position as "Estate Tax/Estate Inventory/License Clerk," Plaintiff Johnson's position as "Settlement/Abstracts/ Tax Rate Specialist," and Plaintiff, Myra

> Allison's position as "Budgetary Financial Specialist." . . .

Court of Appeals at p. 2.

So, in the short time between Patricia Hadley's election and her actually taking office, Petitioner, Baker, went from "Office Manager" to "Clerk," and Petitioner, Johnson, went from "Chief Deputy Auditor" to "Specialist". The Petitioners claimed the title changes were insignificant and did not alter their duties which at all times were routine, nonpolicymaking, nonconfidential, etc. But, the District Court noted that Petitioners, Baker and Johnson, had resigned not just titles but "supervisory authority" immediately prior to Patricia Hadley taking office. [R. 49: Court of Appeals at p. 6].

Petitioners would have Patricia Hadley's personal liability turn on their machinations with the defeated Auditor as to their job titles and responsibilities. If this were the standard for qualified immunity, no one in America would want to run for public office. The ability of newly-elected officeholders to discharge any employees of the prior administration without incurring personal liability would depend on how the defeated incumbent and his or her patronage employees choose to define their positions immediately prior to the new officeholder assuming office.

II.

THE SIXTH CIRCUIT CORRECTLY REVERSED THE DISTRICT COURT'S DENIAL OF SUMMARY JUDGMENT AND REMANDED FOR A DETERMINATION WHETHER IT WAS CLEARLY ESTABLISHED THAT PUBLIC EMPLOYEES *IN PETITIONERS' POSITIONS* COULD NOT BE FIRED FOR THEIR POLITICAL AFFILIATIONS.

In arguing for a change of the qualified immunity standard to one of "actual job duties," the Petitioners have grossly mischaracterized the Sixth Circuit's legal standard for when a position is protected from patronage dismissal. Petitioners declare the Sixth Circuit's standard is a wholly "subjective" one depending entirely on the officeholder's subjective intentions for the position.

However, the Sixth Circuit never applied such a standard here. In relevant part, it stated:

> Courts have applied the *Elrod* and *Branti* framework for assessing the constitutionality of patronage dismissals on a case-by-case basis, examining each position individually . . . In this regard, this Court has analyzed the duties and responsibility of several positions and held that they did not enjoy the right to be free from patronage dismissal . . . We have instructed that when analyzing "whether political considerations are appropriate in making personnel decisions *for a certain position,* we must examine the inherent duties of that position and the duties that the new holder of that position will perform."

. . . [T]he District Court erred in its analysis of whether the law prohibiting patronage dismissals was clearly established at the time Hadley dismissed Plaintiffs by failing to consider whether it was clearly established that employees *in the particular positions at issue in the case,* in light of the responsibilities inherent in those positions, were protected from patronage dismissal. . .

This determination is not precluded by the parties' dispute regarding Plaintiffs' previous job duties at the County Auditor's Office under Auditor Bell. In *Faughender v. City of North Olmsted*, 927 F.2d 909 (6th Cir. 1991), we explained that when determining whether political considerations are appropriate in making personnel decisions for a certain position, a district court should not look to the duties previously performed by the plaintiff. Instead, the Court must examine the inherent duties of that position and the duties that the new hiring authority, i.e., Hadley, reasonably envisions that the holder of that position will perform. *Faughender*, 927 F.2d at 913. In this case, the record does not contain any evidence of what duties Patricia Hadley envisioned that the holders of Plaintiffs' positions would perform. We hold that the District Court erred by failing to consider the duties inherent in Plaintiffs' particular positions and Hadley's plans for the employees holding such positions in determining whether the law was clearly established that

> Plaintiffs' positions were protected from patronage dismissal at the time that Hadley discharged Plaintiffs, and we shall remand these questions to the District Court for further consideration.

Court of Appeals at pp. 9-10 (emphasis in original).

Contrary to Petitioners' assertions, the Sixth Circuit did not say that qualified immunity depends on what the officeholder subjectively intended to be the duties of the position. Rather, it instructed the District Court to reconsider whether, in view of the *inherent* duties of the Petitioners' positions *or* the duties that Patricia Hadley *reasonably envisions* for the positions, the law was so clearly established at the time of Petitioners' terminations that a reasonable official would have understood that their terminations violated their First Amendment rights.

This is a two-prong analysis. Patricia Hadley is entitled to qualified immunity based *either* on the inherent duties of the positions *or* on the duties she reasonably envisions for the positions. The District Court never reached either of these questions, incorrectly finding the material issues of fact regarding Petitioners' job duties precluded summary judgment.

The Sixth Circuit's standard is fully in line with the Court's decision in *Anderson v. Creighton*, 483 U.S. 635 (1987). In *Anderson*, the Court emphasized that "[t]he operation of this standard [*i.e.*, the "objective legal reasonableness" of the action assessed in light of the legal rules that were "clearly established" at the time it was taken]. . . depends substantially on the level of generality at which the relevant 'legal rule' is to be identified." *Id.* at 639. The Court discussed the dangers of defining the relevant legal right too generally, and held that "the right the official is alleged to have violated must have been "clearly

established" in a more particularized, and hence more relevant sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 640. Thus, in *Anderson,* which involved a warrantless search of a residence, this Court held that "It simply does not follow immediately from the conclusion that it was firmly established that warrantless searches not supported by probable cause and exigent circumstances violate the Fourth Amendment that [the defendant's] search was objectively legally unreasonable," and held that the lower court should have considered whether it was "clearly established that the *circumstances* with which [the defendant] was confronted did not constitute probable cause and exigent circumstances." *Id.* at 640-41 (emphasis added).

Plainly, then, a court must look at the particular circumstances with which the officeholder was confronted in deciding whether the law was clearly established. Insofar as patronage dismissals are concerned, the particular circumstances include the positions, the inherent duties of the positions, and the duties for the positions reasonably envisioned by the newly-elected officeholder. As to the latter, the operative word is "reasonably" envisions. This is not a question of subjective intent, but of legal reasonableness consistent with the standard of objective legal reasonableness set forth in *Harlow.*

In the case at bar, neither the Petitioners nor the District Court cited *any* decision of the Supreme Court or the Sixth Circuit which had addressed the issue of political patronage in the hiring or firing of *employees of a county auditor* — let alone employees of a county auditor *in the respective positions of the Petitioners.* Neither did the Petitioners or the District Court cite any case sufficiently analogous that a reasonable official would understand from its resolution that it is a First Amendment violation to dismiss any of the Petitioners. Although Petitioners

claim that *Elrod v. Burns*, 427 U.S. 347 (1976), is factually the same as the present case, in truth it is not even remotely similar. It is just a general statement of the principle that nonpolicymaking and nonconfidential employees cannot be dismissed for patronage reasons.

Finally, while Petitioners complain loudly about the "reasonably envisions" part of the standard (improperly characterizing it as a subjective one), they totally ignore the "inherent duties" aspect. They simply assert that the only correct standard is one based on their actual job duties. Because their proposed standard is clearly contrary to law and public policy, it must be rejected. That decision alone disposes of the present appeal. Furthermore, it remains to be seen how the District Court will apply the Sixth Circuit's "inherent duties" and "reasonably envisions" criteria, so that any appeal in the regard is entirely premature.

III.

THE SIXTH CIRCUIT'S DECISION IS CONSISTENT WITH THE MORE RECENT HOLDINGS ENUNCIATED BY THE UNITED STATES SUPREME COURT.

The Petitioners attempt to advance the argument the Sixth Circuit's decision below conflicts with a decision of the Seventh Circuit in *Nelkolny v. Painter*, 653 F.2d 1164 (7th Cir. 1981). This argument is wide of mark for a number of reasons.

First of all the holding in *Nelkolny* has been misinterpreted by the Petitioners. Unlike the case at bar, the Plaintiffs' claim in *Nelkolny* had proceeded to trial. The Seventh Circuit reversed a directed verdict in favor of the Plaintiff Senior Citizen's Coordinator. That Plaintiff, like the three Petitioners herein, was among the four highest paid employees within the office of the

Township Supervisor, which tended to signify a position of some influence. The court found a reasonable juror could conclude that the Plaintiff was a policymaker and remanded the matter for a finding by the trier of fact.

Secondly, there is no conflict with other, more recent Seventh Circuit decisions. Repeatedly that court has found that law with regard to specific positions is not clearly established. In the case of *Upton v. Thompson*, 930 F.2d 1209 (7th Cir. 1991), the Seventh Circuit found that the law was not clearly established with regard to the firing of deputy sheriffs, in spite of the fact that there was split authority on the exact same positions. The Petitioners, herein, have never been able to cite a specific legal precedent of an Auditor's office employees being wrongfully terminated for political reasons. The Seventh Circuit Court stated in *Upton:*

> While a circuit split is not helpful in determining whether or not a deputy sheriff is protected by the First Amendment from patronage firing, such a split is indicative of the fact that the deputy sheriff's rights in this regard are currently unsettled as a matter of constitutional law and therefore were not "clearly established" at the time of the deputies' firings.

930 F.2d at 1217. In arriving at that decision the court cited other Seventh Circuit authority that was decided after *Nelkolny:*

> [i]f the law at the time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to know that the law forbade conduct not

> previously identified as unlawful. *Greenberg v. Kmetko*, 840 F.2d 467, 472 (7th Cir. 1988) (quoting *Harlow*, 457 U.S. at 818, 102 S.Ct. at 2738). *See also Cygnar v. City of Chicago*, 865 F.2d 827, 843 (7th Cir. 1989). What is important, in the final analysis, is "whether the legal norms governing [the government official's] behavior were clearly established at the time of the challenged actions." *Wrigley v. Greanias*, 842 F.2d 955, 958 (7th Cir. 1988) (quoting *Wade v. Hegner*, 804 F.2d 67, 71 (7th Cir. 1986).
>
> * * *
>
> Immunity should be applied unless "it has been authoritatively decided that certain conduct is forbidden." *Alliance to End Repression v. City of Chicago*, 820 F.2d 873, 875 (7th Cir. 1987). To prove the presence of a clearly established constitutional right, the plaintiff must point to "closely analogous cases" decided prior to the defendants' challenged actions. *Rakovich v. Wade*, 850 F.2d 1180, 1205 (7th Circuit), *cert. denied*, 488 U.S. 968, 109 S. Ct. 497, 102 L. Ed. 2d 534 (1988).

930 F.2d at 1212.

Finally, *Nelkolny* was decided *before* the Supreme Court's decision in *Anderson v. Creighton, supra.* In *Anderson* the Court stated:

> The right the official is alleged to have

> violated must have been "clearly established" in a "particularized" way and "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.

483 U.S. at 640.

In *Nelkolny* the Seventh Circuit did not look for "particularized" case law that was later mandated by the Supreme Court in *Anderson*. For that reason, the 1981 case of *Nelkolny* cannot be considered in conflict with the Sixth Circuit decision. The writ should be denied so that the evidence needed on the positions can be considered by the trial court.

IV.

THE COURT OF APPEALS CORRECTLY EXERCISED JURISDICTION OVER THE INSTANT INTERLOCUTORY APPEAL.

The Petitioners argue that material issues of fact precluded the Sixth Circuit Court of Appeals from considering Patricia Hadley's interlocutory appeal of the denial of summary judgment on the issue of qualified immunity. Contrary to that argument, the Sixth Circuit found that the claimed disputed past duties of the Petitioners was not the determinative factor. The District Court had erred in its analysis of whether the law prohibiting patronage dismissals was clearly established when the Respondent terminated the Petitioners' employment. Thus, a legal question was decided. Even if there is an issue of material facts, necessary to be determined for a decision on the issue of qualified immunity, that is a legal question subject to *de novo* review. *Cartier v. Lussier*, 955 F.2d 841, 844 (2nd Cir. 1992).

Interlocutory appeal of the denial of summary judgment motion asserting qualified immunity is warranted because

qualified immunity is not merely a defense to a law suit — it is an "entitlement" not to be sued at all. *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Huron Valley Hospital v. City of Pontiac*, 792 F.2d. 563, 566-67 (6th Cir. 1986). The existence of qualified immunity is addressed so early because liability is not the sole public danger of law suits against public officials. The threat of liability and necessary attention to pretrial matters, such as discovery, distract their government functions and discourage able persons from entering public service. *Mitchell, supra.* Interlocutory appeal is appropriate because the entitlement not to be sued is "lost forever" if an immune public official is required to litigate the case all the way to trial. Thus, government officials are generally afforded qualified immunity, shielding them from civil damages, at the earliest stage possible, as long as their conduct does not violate clearly established constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald, supra.*

The issue of qualified immunity is one of law, and is an appealable final decision. *Mitchell, supra; Garvie v. Jackson*, 845 F.2d 647, 649 (6th Cir. 1988). Since application of the doctrine of qualified immunity to a particular defendant is a question of law, the Sixth Circuit Court of Appeals reviews *de novo* the District Court's determination. *Cagle v. Gilley*, 957 F.2d 1347, 1348 (6th Cir. 1982); *Faughender v. City of North Olmsted*, 927 F.2d 909 (6th Cir. 1991). The Sixth Circuit has emphatically stated that the issue of qualified immunity should not be left to the trier of fact, but instead is "purely a matter of law for the trial Judge to determine, or for the United States (Sixth Circuit Court of Appeals) to decide on *any* appeal which ought to be taken." *Dominque v. Telb*, 831 F.2d 673, 676 (6th Cir. 1987). In the case at bar, the District Court failed to take heed on the issue and left it undecided:

Depending on the results of the fact finding

> regarding plaintiffs' roles at the County Auditor's office prior to their discharge, qualified immunity may or may not apply. Material issues of fact between the parties prevent summary disposition of qualified immunity issues before this Court.

R. 49: Order, at p.6.

The Sixth Circuit Court properly exercised jurisdiction over the denial of Patricia Hadley's Motion for Summary Judgment on the issue of qualified immunity. The Petition for Writ of Certiorari should be denied.

V.

THE COURT OF APPEALS WAS NOT OBLIGED TO CONSIDER THE PETITIONERS' CROSS-APPEAL ON THE ISSUE OF QUALIFIED IMMUNITY.

The right to an interlocutory appeal is extremely limited. The one relevant exception to the rule against interlocutory appeals was established by the Supreme Court in *Mitchell v. Forsyth, supra.* This Court held that the denial of a *Defendant's* Motion for Summary Judgment on the issue of qualified immunity is immediately appealable. There is no exception for the denial of a *Plaintiff's* Motion for Summary Judgment on whether the elected official is personally liable as a matter of law.

Petitioners' own authority defeats their argument. A court's decision to exercise pendant jurisdiction of a nonappealable District Court ruling is totally discretionary. *Kelly v. Curtis,* 21 F.3d 1544 (11th Cir. 1994). Petitioners have not attempted to demonstrate any abuse of discretion.

Had this issue been decided in the Petitioners' favor it would have had no practical effect on the Sixth Circuit's ruling. The case would most likely be remanded for a determination of additional facts. The Petitioners' argument for "judicial economy" is not persuasive.

CONCLUSION

Therefore, for the reasons stated, Respondent, Patricia Hadley, respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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